

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JESSE ARON ROSS,

Plaintiff,

vs.

AMY KRUEGER, *et al.*,

Defendants.

Case No.: 2:13-cv-00355-GMN-VCF

ORDER

Pending before the Court is the Motion for Summary Judgment (ECF No. 82) filed by Defendants Greg Arms, Butch Brasky, Anthony Demeo, Danny Ellis, Scott Gutheridge, Gary Hollis, Amy Krueger, Richard Marshall, Nye County, Ricardo Ramirez, Terry Rising, Carina Skyles, Karyn Smith, Melissa Taylor, Shirley Trummell, Lorinda Wichman, Brian Young, and Jadey Zaragoza (collectively “Defendants”) on June 20, 2014. Despite being granted two extensions of time pursuant to untimely requests, (Extension Orders, ECF Nos. 88 & 96), *pro se* Plaintiff Jesse Aron Ross (“Plaintiff”) filed his untimely Response (ECF No. 97) on September 21, 2014. The next day, on September 22, 2014, Plaintiff refiled a copy of his Response as a Cross-Motion for Summary Judgment (ECF No. 98).¹ Defendants subsequently filed their Reply (ECF No. 100) on October 8, 2014.

I. BACKGROUND

According to the operable Second Amended Complaint (“SAC”), Plaintiff is an inmate at High Desert State Prison (“HDSP”) after having been sentenced in state court on December

¹ Because the cross-motion was filed three months after the June 24, 2014 dispositive motions deadline without seeking leave from the Court or making a showing of good cause, Plaintiff’s Cross-Motion for Summary Judgment is **DENIED**. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608–10 (9th Cir. 1992) (finding that motions filed after the deadline in the scheduling order can be denied for being untimely unless good cause for the delay is shown).

1 10, 2012. (SAC at 1, 8, ECF No. 72). From October 6, 2010 until the date of his sentencing,
2 however, Plaintiff was a pre-trial detainee at Nye County Detention Center (“NCDC”) and was
3 housed at both NCDC’s Pahrump facility (“NCDC Pahrump”) and its Tonopah facility
4 (“NCDC Tonopah”). (*Id.* at 1–8). Plaintiff alleges that during his time at NCDC Defendants
5 violated his civil rights by denying him medical, dental, and mental health treatment and by
6 denying him access to the exercise yard. (*Id.* at 8–9).

7 Specifically, Plaintiff alleges nine separate counts of violations to his civil rights. (*Id.* at
8 10–26). In Counts I–VI, Plaintiff alleges deliberate indifference to his medical needs in
9 violation of the Fourteenth Amendment. (*Id.* at 10–23). In Count VII, Plaintiff alleges an equal
10 protection violation based on the same conduct alleged in Counts I–VI. (*Id.* at 24). In Count
11 VIII, Plaintiff alleges a due process violation based on denied access to the exercise yard. (*Id.* at
12 25). Finally, in Count IX, Plaintiff alleges that by failing to implement policies, customs, and
13 practices that ensured detainees received timely medical treatment, Defendants violated the
14 Fourteenth Amendment and the Due Process Clause. (*Id.* at 26).

15 **II. LEGAL STANDARD**

16 The Federal Rules of Civil Procedure provide for summary adjudication when the
17 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
18 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
19 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
20 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
21 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
22 jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if
23 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
24 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
25 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A

1 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
2 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

3 In determining summary judgment, a court applies a burden-shifting analysis. “When
4 the party moving for summary judgment would bear the burden of proof at trial, it must come
5 forward with evidence which would entitle it to a directed verdict if the evidence went
6 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
7 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
8 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
9 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
10 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
11 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
12 party failed to make a showing sufficient to establish an element essential to that party’s case
13 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
14 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
15 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,
16 398 U.S. 144, 159–60 (1970).

17 If the moving party satisfies its initial burden, the burden then shifts to the opposing
18 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
19 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
20 the opposing party need not establish a material issue of fact conclusively in its favor. It is
21 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
22 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
23 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
24 summary judgment by relying solely on conclusory allegations that are unsupported by factual
25 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go

1 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
2 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

3 At summary judgment, a court's function is not to weigh the evidence and determine the
4 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
5 The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn
6 in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is
7 not significantly probative, summary judgment may be granted. *See id.* at 249–50.

8 **III. DISCUSSION**

9 **A. Counts I–VI; Deliberate Indifference**

10 Plaintiff's first six counts allege deliberate indifference on the part of Defendants for
11 failing to provide necessary medical care. (SAC at 10–23, ECF No. 72).

12 Generally, a prisoner's deliberate indifference claims arise from the Eighth
13 Amendment's safeguard against cruel and unusual punishment. *Gibson v. Cnty. of Washoe,*
14 *Nev.*, 290 F.3d 1175, 1187–88 (9th Cir. 2002). However, when an individual has not been
15 convicted of a crime, but is instead a pre-trial detainee, his rights derive from the due process
16 clause of the Fourteen Amendment rather than the Eighth Amendment. *Id.* (citing *Bell v.*
17 *Wolfish*, 441 U.S. 520, 535 (1979); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998)). The
18 due process clause of the Fourteenth Amendment imposes, at a minimum, the same duty as the
19 Eighth Amendment that "persons in custody have the established right to not have officials
20 remain deliberately indifferent to their serious medical needs." *Id.* (citing *Carnell v. Grimm*, 74
21 F.3d 977, 979 (9th Cir. 1996)).

22 Deliberate indifference "may appear when prison officials deny, delay or intentionally
23 interfere with medical treatment, or it may be shown by the way in which prison officials
24 provided medical care." *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (quoting *Jett*
25 *v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)). However, the deliberate indifference test is

1 not an easy test for a plaintiff to satisfy. *Hallett v. Morgan*, 296 F.3d 732, 745 (9th Cir. 2002);
2 *see also Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (“The Eighth Amendment is not
3 a basis for broad prison reform. It requires neither that prisons be comfortable nor that they
4 provide every amenity that one might find desirable. Rather, the Eighth Amendment proscribes
5 the unnecessary and wanton infliction of pain. . . .”) (quotations omitted). The test for
6 deliberate indifference contains two parts. “First, the plaintiff must show a serious medical
7 need by demonstrating that failure to treat a prisoner’s condition could result in further
8 significant injury or the unnecessary and wanton infliction of pain.” *Jett*, 439 F.3d at 1096
9 (quotations omitted). “Second, the plaintiff must show the defendant’s response to the need
10 was deliberately indifferent.” *Id.* Such deliberate indifference is shown by proving (a) a
11 purposeful act or failure to respond to a prisoner’s pain or possible medical need and (b) harm
12 caused by the indifference. *Id.* However, “an ‘inadvertent or negligent failure to provide
13 adequate medical care’ alone does not state a claim under § 1983.” *Id.* (citing *Estelle v.*
14 *Gamble*, 429 U.S. 97, 105 (1976)); *see also Wood v. Housewright*, 900 F.2d 1332, 1334 (9th
15 Cir. 1990) (“While poor medical treatment will at a certain point rise to the level of
16 constitutional violation, mere malpractice, or even gross negligence, does not suffice.”).

17 **1. Count I – Dental Care for Abscessed Tooth**

18 In support of his claim in Count I, Plaintiff alleges that on October 13, 2010, while being
19 housed at NCDC Pahrump, he submitted a medical request based upon a severe toothache.
20 (SAC at 10, ECF No. 72). Two weeks later on October 28, 2010, he was interviewed by a Nye
21 County Health and Human Services employee about his dental complaint, but nothing came of
22 this interview. (*Id.*). However, four months later on February 24, 2011, Plaintiff was receiving
23 medical treatment for pneumonia when the doctor examining him diagnosed that his tooth had
24 an abscessed root and prescribed him antibiotics. (*Id.* at 10–11). Subsequently, Plaintiff
25 received a full oral exam on March 15, 2011, after which his abscessed tooth was removed. (*Id.*

1 at 11).

2 Plaintiff contends that the five-month delay between the filing of his medical request and
3 his receiving dental care constitutes deliberate indifference on the part of Defendants. (*Id.* at
4 10–11). In their motion, Defendants point out that Plaintiff was interviewed by a healthcare
5 employee in response to his request only two weeks after the request was filed. (MSJ 18:18-22,
6 ECF No. 19; Oct. 13, 2010 Request Form, ECF No. 84-1). Defendants also assert—and
7 Plaintiff does not dispute—that between his interview on October 28, 2010 and his examination
8 on February 24, 2011, Plaintiff had several other medical appointments at which he failed to
9 mention his dental issues. (*Id.* 19:2-4). However, less than three weeks after the February 24,
10 2011 exam discovering the abscessed tooth, Plaintiff was provided a full oral exam at which his
11 tooth was removed. (*Id.* 18:22-25; Feb. 24, 2011 Doctor’s Notes, ECF No. 84-3; Dental Claim
12 Form, ECF No. 84-5).

13 Though the record does not show that Defendants acted with diligence in providing
14 Plaintiff with medical care for his tooth, the Court finds that Plaintiff has failed to show
15 sufficient evidence that Defendants acted with deliberate indifference. Defendants responded
16 to Plaintiff’s complaint by having his tooth examined two weeks after being notified of the
17 complaint, and provided a full oral exam and removal of the tooth less than three weeks after
18 the abscessed tooth was diagnosed. At most, the failure to properly diagnose the tooth abscess
19 during the October 28, 2010 interview or to have a full oral exam conducted sooner than three
20 weeks after the diagnoses amounts to mere negligence, not deliberate indifference. *See Frost*,
21 152 F.3d at 1130; *see also Lewis v. Naku*, 650 F. Supp. 2d 1090, 1094 (E.D. Cal. 2009) (“The
22 Court finds that the Defendant’s failure to initially diagnose Petitioner with degenerative disc
23 dysplasia during this medical visit was not deliberately indifferent and did not violate Plaintiff’s
24 constitutional rights.”). Accordingly, Defendants are granted summary judgment on Count I.

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2. Count II – Requests to See an Optometrist

In support of his claim in Count II, Plaintiff alleges that on March 12, 2011 he submitted a medical request to see an optometrist because he believed he needed glasses, but his request was denied on the grounds that he did not qualify for the service. (SAC at 12, ECF No. 72). He filed a grievance based on this denial on May 29, 2011, which was denied, and he resubmitted his request on June 12, 2011. (*Id.*). On June 30, 2011, his second request was also denied and Plaintiff was never examined by an eye doctor at NCDC. (*Id.* at 13). However, only eleven days after being transferred to HDSP, Plaintiff was diagnosed with poor vision and subsequently received glasses. (*Id.*).

The Ninth Circuit has recently held that loss of vision, though not life threatening, can be a serious medical need. *See Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (finding a cataract in one eye was a serious medical condition); *see also Koehl v. Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (finding that an inmate who needed eyeglasses for double vision and loss of depth perception had a serious medical need). Moreover, Defendants do not assert in their motion that Plaintiff's eye troubles were not severe enough to qualify as a serious medical need. Therefore, there is at least a genuine issue of material fact concerning whether Plaintiff's poor vision constituted a serious medical need that satisfies the first element of his deliberate indifference claim.

Regarding the second element, Plaintiff contends that Defendants were deliberately indifferent in their response to his complaints when they failed to provide him necessary eye care, particularly in light of the fact that he was prescribed glasses shortly after being transferred to the custody of HDSP. (Resp. at 25, ECF No. 97). Defendants counter that they were not deliberately indifferent because pursuant to Nye County's Inmate Medical Indigent Program, they could not provide Plaintiff with non-emergency eye care unless a doctor determined such care was necessary. (MSJ 17:25-18:11, ECF No. 82). This same policy was

1 the reason provided to Plaintiff for all of his optometry request denials, which state that
2 Plaintiff did not qualify for care because he “ha[d] not received written verification from either
3 a doctor or the NCSO [Nye County Sheriff’s Office] stating that his request was an
4 emergency.” (March 15, 2011 Denial Letter, ECF No. 84-21; May 29, 2011 Grievance Denial,
5 ECF No. 84-22; June 14, 2011 Denial Letter, ECF No. 84-24). Although the precise details of
6 this policy remain unclear,² it appears that the policy does not allow an indigent inmate without
7 insurance to see a medical professional for a medical complaint unless a medical professional
8 or the NCSO verifies that the complaint is a medical emergency. In other words, unless an
9 indigent inmate happens to have a separate medical emergency that allows him to see a doctor
10 who could then diagnose him or his medical condition is so obviously an emergency that
11 someone without medical training from the NCSO could identify it as such, he is automatically
12 precluded from receiving healthcare.

13 A reasonable jury could find that such a policy, which mandates deliberate indifference
14 on the part of prison officials unless a doctor tells them they can act, constitutes deliberate
15 indifference in its own right. *See Colwell*, 763 F.3d at 1068 (“A reasonable jury could find that
16 Colwell was denied surgery, not because it wasn’t medically indicated, not because his
17 condition was misdiagnosed, not because the surgery wouldn’t have helped him, but because
18 the *policy* of the NDOC is to require an inmate to endure reversible blindness in one eye if he
19 can still see out of the other. This is the very definition of deliberate indifference.”); *see also*
20 *Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470, 1477-78 (9th Cir. 1992) (“Whether a
21 local government entity has displayed a policy of deliberate indifference is generally a question
22 for the jury.”). Indeed, Defendants argument against Plaintiff’s claim appears to be that they
23

24 ² In his Response to the Summary Judgment Motion, Plaintiff attached a copy of the Nye County Procedures for
25 Health and Human Services. (Nye County Procedures, Ex. U to Response 52–85, ECF No. 97-6). Section 4 of
this document is entitled “Medical Indigent Programs (MIP)” and section 6.3 is entitled “Indigent Inmate
Policy,” however, neither section contains the requirement that indigent inmates may only receive care after
obtaining written verification that they have a medical emergency. (*Id.*).

1 could not have been deliberately indifferent because the policy required them to be indifferent.
2 *See* (MSJ 18:8–11, ECF No. 82) (“[S]ince there was no documentation stating th[at] Ross’
3 optometry requests were medical necessities, NCHHS had no choice but to deny Ross’
4 requests. Accordingly, Defendant were not deliberately indifferent to Ross’ optometry
5 needs.”). Defendants, however, cannot as a group claim a lack of deliberate indifference based
6 on adherence to a policy over which some of the Defendants had direct control. While it is
7 possible that some of the Defendants may be entitled to summary judgment on this claim due to
8 their lack of personal involvement, Defendants have failed to identify which Defendants may
9 be so entitled. Accordingly, summary judgment on Count II is denied.

10 **3. Count III – Dental Care for Rotting Teeth**

11 In support of his claim in Count III, Plaintiff alleges that on September 16, 2011 he
12 submitted a medical request to be seen by a dentist for an impacted wisdom tooth. (SAC at 14,
13 ECF No. 72). On September 25, 2011, he submitted a second request asking that his first
14 request be expedited because of his “severely worsen[ing]” condition. (*Id.*). On September 26,
15 2011, however, his requests were denied. (*Id.*). On May 6, 2012, Plaintiff submitted a third
16 medical request to be seen by a dentist, this time claiming that he had two decaying teeth. (*Id.*
17 at 15). This request was also denied. (*Id.*). On March 7, 2013, less than three months into his
18 incarceration at HDSP, Plaintiff submitted another request to see a dentist which resulted in
19 having two of his teeth removed due to decay. (*Id.* at 16).

20 Defendants do not dispute that “[d]ental care is an important medical need, the denial of
21 which may constitute an Eighth Amendment violation.” *Dixon v. Bannister*, 845 F. Supp. 2d
22 1136, 1143 (D. Nev. 2012) (citing *Hunt v. Dental Dep’t*, 865 F.2d 198, 200 (9th Cir. 1989)).
23 Furthermore, Defendants do not assert that Plaintiff’s two rotten teeth were not severe enough
24 to qualify as a serious medical need. Therefore, there is at least a genuine issue of material fact
25 concerning whether Plaintiff’s rotten teeth constituted a serious medical need that satisfies the

1 first element of this deliberate indifference claim.

2 Defendants, however, again argue that they were not deliberately indifferent because
3 Plaintiff had failed to obtain written verification of his medical emergency from either a doctor
4 or the NCSO as required under the Nye County's Inmate Medical Indigent Program. (MSJ
5 18:26–19:9 ECF No. 82); *see also* (Sept. 26, 2011 Denial Letter, ECF No. 84-7; May 8, 2012
6 Denial Letter, ECF No. 84-9). As the Court already held in relation to Count II, there is at least
7 a genuine issue of material fact concerning whether the policy under the Nye County's Inmate
8 Medical Indigent Program is itself a violation of Plaintiff's constitutional rights. *See supra* 7:1–
9 9:6. Therefore adherence to the policy does not show that Plaintiff's deliberate indifference
10 claim fails.

11 Defendants also argue in their Reply that they could not have been deliberately
12 indifferent to Plaintiff's dental requests because Plaintiff had two other medical appointments
13 during the summer of 2012 to refill his prescriptions and examine his ankle and the physician's
14 notes from these appointments do not show that Plaintiff complained about his teeth. (Reply
15 5:1–11, ECF No. 100; Summer 2012 Exam Notes, ECF No. 84-10). Defendants also point out
16 that, on December 8, 2012—just before his transfer to HDSP—Plaintiff requested a tooth
17 examination during a doctor's visit, and the physician who examined Plaintiff's tooth found no
18 infection. (Reply 5:1–11, ECF No. 100; Dec. 8, 2012 Exam Notes, ECF No. 84-11).

19 However, the December 8, 2012 Exam Notes simply states: "Ears, Nose, Mouth, and
20 Throat Scattered caries and chipped teeth, no infection," and the early exam notes contain no
21 indication one way or another concerning whether Plaintiff mentioned his teeth. (Summer 2012
22 Exam Notes, ECF No. 84-10; Dec. 8, 2012 Exam Notes, ECF No. 84-11). Therefore, these
23 notes merely create factual questions concerning what, if anything, Plaintiff said to various
24 doctors during this time about his teeth. Moreover, Defendants are not entitled to summary
25 judgment on this claim regardless of what Plaintiff may or may not have told physicians during

1 his visits. Defendants denied Plaintiff's request for dental care based exclusively upon the
2 policy of the Nye County's Inmate Medical Indigent Program, not based upon any finding by a
3 doctor that Plaintiff's teeth were fine or Plaintiff's failure to report his condition to doctors
4 during other visits. *See* (Sept. 26, 2011 Denial Letter, ECF No. 84-7; May 8, 2012 Denial
5 Letter, ECF No. 84-9). Therefore, because the policy was the exclusive reason for the denial of
6 dental care, there is at least a genuine issue of material fact concerning whether Defendants'
7 automatic denial of Plaintiff's requests pursuant to the policy constituted deliberate
8 indifference. Accordingly, summary judgment on Count III is denied.³

9 **4. Count IV – Passing Blood**

10 In support of his claim in Count IV, Plaintiff alleges that in early January of 2012, while
11 incarcerated at NCDC Tonopah, he submitted a medical request because he was passing blood
12 in his stool and was having chest pains. (SAC at 17, ECF No. 72). About two months later he
13 was examined by a doctor who ordered an x-ray, but no x-ray was performed. (*Id.*). Then on
14 March 12, 2012, he was seen by another doctor who ordered a colonoscopy. However, despite
15 these orders and Plaintiff's continuing symptoms, not tests were done while Plaintiff was at
16 NCDC. (*Id.*).

17 Defendants argue that they cannot be deliberately indifferent to Plaintiff's medical
18 condition in Count IV because Plaintiff was examined by a doctor on March 19, 2012 after his
19 first complaint and Defendants had consistently approved Plaintiff to receive treatment for his
20 condition between January 12, 2012 and November 28, 2012. (MSJ 16:11–17:22 ECF No. 82).
21 Defendants also assert that from May to November of 2012, Plaintiff did not file any
22 grievances related to this medical issue. (*Id.*). In support of these arguments, Defendants
23 provide documents showing that Plaintiff was seen by a doctor for this condition on March 19,
24

25 ³ Again, it is possible that some of the Defendants may be entitled to summary judgment on this claim due to their lack of personal involvement, but Defendants have failed to identify which Defendants may be so entitled.

1 2012; that Plaintiff was pre-authorized to receive treatment on January 12, March 14, April 17,
2 August 24, September 11, and November 19, 2012; and that Plaintiff requested medical care on
3 January 8, March 12, March 20, and November 11, 2012. (Medical Forms, ECF Nos. 84-12–
4 84-17).

5 None of Defendants’ arguments or documents, however, refute Plaintiff’s assertions or
6 show that Defendants were not deliberately indifferent. All Defendants have shown is that (1)
7 Plaintiff complained of his medical condition, (2) Defendants recognized the condition was a
8 medical emergency and approved treatment, (3) Defendants took Plaintiff to one doctor who
9 recommended an x-ray and a colonoscopy, and (4) Defendants continued to preapprove
10 Plaintiff to receive treatment for his condition. (*Id.*). However, Defendants never argue or
11 show that Plaintiff ever actually received any treatment other than the one visit where the
12 doctor recommended that Plaintiff needed to see a GI specialist for a colonoscopy. (March 19,
13 2012 Exam Notes, ECF No. 84-16). All Defendants’ evidence shows is that Plaintiff had a
14 sufficiently severe medical need to satisfy the first element of deliberate indifference, and that a
15 genuine issue of material fact exists concerning whether Defendants ever actually provided
16 Plaintiff with the treatment recommended by a doctor nine months before Plaintiff was
17 transferred to HDSP. If Plaintiff never received the care recommended by a physician for a
18 severe medical condition, Defendants’ failure to provide that care could satisfy the second
19 element of Plaintiff’s claim. *See Caplinger v. CCA*, 999 F. Supp. 2d 1203, 1214 (D. Idaho
20 2014) (“Deliberate indifference can be ‘manifested by . . . prison guards in intentionally
21 denying or delaying access to medical care or intentionally interfering with the treatment once
22 prescribed.’”) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976)). Accordingly,
23 summary judgment.

24 **5. Count V – Requests to See Mental Health Professional**

25 In support of his claim in Count V, Plaintiff alleges that between January 1, 2012 and

1 June 1, 2012 he submitted several requests to see a psychiatrist or other mental health
2 professional, but all his requests were denied because he could not pay for the treatment. (SAC
3 at 18, ECF No. 72). On June 11, 2012, Plaintiff submitted a formal grievance based on his
4 denials. Plaintiff received a response saying that he was not being denied mental health
5 treatment because he had seen a counselor and because NCDC's mental health professionals
6 were no longer under contract and the local private facility was refusing to see inmates. (*Id.* at
7 18–19); *see also* (Decl. of Defendant Marshall ¶¶ 25–28, ECF No. 84).

8 Defendants assert that they were not deliberately indifferent to Plaintiff's requests to see
9 a mental health professional because he was authorized for and received treatment from a
10 mental health professional on a nearly monthly basis from November 2010 until June of 2012.
11 (MSJ 19:10–20:13, ECF No. 82; Psych Authorization Letters, ECF No. 84-18). However, as
12 Defendants explained to Plaintiff in the responses to his grievance, the contract for the mental
13 health professionals employed by NCDC expired in June 2012 and the doctors declined to
14 renew the contract. (Grievance Responses, ECF No 84-19). Defendants then began
15 transporting Plaintiff and other inmates to Nye Regional Medical Center ("NRMC"), but
16 shortly thereafter, NRMC began refusing to see NCDC inmates. (Decl. of Defendant Marshall ¶
17 27, ECF No. 84). Plaintiff then had at least one visit with a counselor at Pahrump Valley
18 Counseling in September of 2012. (Psych Authorization Letters, ECF No. 84-18).

19 "It is firmly established that medical needs [protected by the Eighth Amendment]
20 include not only physical health needs, but mental health needs as well." *Madrid v. Gomez*, 889
21 F. Supp. 1146, 1255 (N.D. Cal. 1995); *see Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir.
22 1994) ("[R]equirements for mental health care are the same as those for physical health care
23 needs."). However, Defendants' unrefuted evidence showed that they routinely provided
24 Plaintiff with mental health counseling for over a year and a half, and when their contracted
25 health care professionals became unavailable, they took several steps and partially succeeded in

1 providing Plaintiff with his requested care. Therefore, Defendants were not deliberately
2 indifferent to Plaintiff's requests for mental health treatment. *See Bowen v. Treiber*, 492 F.
3 Supp. 2d 1206, 1213–14 (E.D. Cal. 2006) (finding that prisoner officials were not deliberately
4 indifferent to inmates hernia when they attempted to treat his symptoms and the fifteen month
5 delay in receiving surgery was caused by waiting for administrative approval); *see also Hallett*
6 *v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) ("Prison officials are deliberately indifferent to a
7 prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical
8 treatment."). Moreover, Plaintiff claim must fail because he does not allege any harm that
9 resulted from the disruption to his routine mental health visits. *See Jett*, 439 F.3d at 1096
10 (Deliberately indifference "is satisfied by showing (a) a purposeful act or failure to respond to a
11 prisoner's pain or possible medical need *and (b) harm caused by the indifference.*") (emphasis
12 added); *Wood*, 900 F.2d at 1335 ("Nor does the delay in treatment that Wood suffered
13 constitute an eighth amendment violation; the delay must have caused substantial harm.").
14 Accordingly, Defendants are granted summary judgment on Count V.

15 **6. Count VI – Requests to have Psychological Medications Refilled**

16 In support of his claim in Count VI, Plaintiff alleges that on July 10, 2012 he submitted a
17 medical request to have his psychological medications refilled. (SAC at 20, ECF No. 72). He
18 further alleges that he submitted additional requests to have his medications refilled on August
19 1, August 18, and September 11, 2012, but these requests were ignored. (*Id.* at 20–21). On
20 September 15, 2012, Plaintiff ran out of his psychological medications and began to experience
21 symptoms of withdrawal, including chest pains, hot and cold flashes, headaches, and
22 hallucinations. (*Id.* at 21–22). Plaintiff then admits that his medications were refilled on
23 September 18, 2012, but that he ran out again on October 5, 2012. (*Id.* at 22). On October 5,
24 2012, Plaintiff submitted a grievance asking for his medication to be refilled and to see a
25 psychiatrist, and it is unclear from the SAC whether Plaintiff's prescriptions were refilled over

1 the remaining two months he was housed by NCDC. (*Id.* at 22–23).

2 Defendants assert that they were not deliberately indifferent to Plaintiff’s requests for his
3 medications to be refilled because his prescriptions were refilled with only some short
4 interruptions caused by the loss of their contracted mental health professionals and short
5 staffing. (MSJ 19:10–20:13, ECF No. 82; Reply 13:4–14:9, ECF No. 100): *see also* (Oct. 5,
6 2012 Grievance Response, ECF No. 84-19) (stating “medications are at CVS [and] are being
7 picked up and ship[ped] to [NCDC] on next transport”). While Defendants may have been
8 negligent in allowing Plaintiff’s medications to run out on at least two occasions, Plaintiff
9 admits that his prescriptions were refilled the first time after only three days, and the
10 undisputed evidence shows that Defendants took immediate action to refill Plaintiff’s
11 prescription on the day they ran out the second time. Therefore, Defendants were not
12 deliberately indifferent to Plaintiff’s need to have his prescriptions refilled. *See Pickard v.*
13 *Holton*, No. 12-CV-01489-JST, 2013 WL 5195616, at *5–6 (N.D. Cal. Sept. 16, 2013)
14 (“Finally, although Defendants admit occasional isolated delays in providing Pickard’s pain
15 medication may have occurred due to emergencies and safety considerations that are involved
16 in any jail setting, there is no evidence showing anyone ever intentionally withheld pain
17 medication from Pickard. On these facts, the Court concludes that Defendants were not
18 deliberately indifferent to Plaintiff’s medical needs.”) (citations omitted). Accordingly,
19 Defendants are granted summary judgment on Count VI.

20 **B. Count VII; Equal Protection**

21 Count VII of Plaintiff’s SAC merely states the general allegation that while he was
22 incarcerated by NCDC between October 6, 2012 and December 10, 2012, Plaintiff was denied
23 medical care in violation of the Equal Protection Clause because detainees who had money and
24 insurance were not denied this care. (SAC at 24, ECF No. 72).

25 “The Equal Protection Clause of the Fourteenth Amendment commands that no State

1 shall deny to any person within its jurisdiction the equal protection of the laws, which is
2 essentially a direction that all persons similarly situated should be treated alike.” *City of*
3 *Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (internal quotations omitted).
4 “To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the
5 Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or
6 purpose to discriminate against the plaintiff based upon membership in a protected class.” *Lee*
7 *v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001).

8 Plaintiff’s claim here is that indigent prisoners were not treated the same as prisoners
9 who could pay for their own medical treatment because indigent prisoner were not able to
10 obtain the same level medical care, including care such as “elective/cosmetic procedures.”
11 (SAC at 24, ECF No. 72). However, “indigent prisoners are not a suspect class.” *Rodriguez v.*
12 *Cook*, 169 F.3d 1176, 1179 (9th Cir. 1999). Furthermore, “there is no ‘fundamental interest’ in
13 inmate-initiated non-emergency or non-life-threatening medical visits.” *Gardner v. Wilson*, 959
14 F. Supp. 1224, 1229 (C.D. Cal. 1997). Therefore, because indigent prisoners are not a suspect
15 class and no fundamental interest was burdened, any different treatment passes constitutional
16 scrutiny so long as it is rationally related to a legitimate governmental interest. *See Taylor v.*
17 *Delatoore*, 281 F.3d 844, 849 (9th Cir. 2002).

18 Controlling costs by limiting an indigent inmates’ ability to abuse scarce medical services
19 is a legitimate state purpose. *See Gardner*, 959 F. Supp. at 1229; *see also Johnson v. Dep’t of*
20 *Pub. Safety & Corr. Servs.*, 885 F. Supp. 817, 820 (D. Md. 1995) (A co-pay “policy represents
21 a commendable effort to promote inmate responsibility and the efficient use of scarce medical
22 resources.”). Therefore, Defendants’ policy of allowing prisoners who can afford non-essential
23 medical care to obtain it while denying indigent prisoners from receiving that care at the
24 expense of the state passes equal protection scrutiny. Moreover, looking at the issue another
25 way, Defendants were not treating similarly situated individuals differently because all inmates

are required to pay for their own non-emergency medical care. *See Rogers v. Ponce*, No. 1:09-CV-01027, 2011 WL 798818, at *2 (E.D. Cal. Feb. 22, 2011) (“Plaintiff is not being treated differently than similarly situated inmates, as all inmates are required to pay for their photocopies.”); *cf. Pleasant v. Cnty. of Merced*, No. 1:13-CV-00805-AWI, 2014 WL 5781235, at *5 (E.D. Cal. Nov. 5, 2014) (“Here, however, jail officials did not treat similarly situated individuals differently, as indigent inmates seeking welfare kits were not similarly situated to non-indigent inmates ordering other items from the commissary during the 6 1/2 week transition to the new vendors.”). Accordingly, Defendants are granted summary judgment on Count VII.

C. Count VIII; Exercise Yard

In Count VIII, Plaintiff alleges that while he was housed at NCDC Pahrump he was denied access to the exercise yard and kept confined in a small cell in violation of the Due Process Clause. (SAC at 25, ECF No. 72).

In response to Plaintiff’s claim Defendants admit that the outside exercise yard at NCDC Pahrump was closed for seven to nine months because construction of a new jail required removal of the security fence around the yard. (MSJ 20:14–21:8, ECF No. 82; Decl. of Defendant Marshall ¶¶ 34–39, ECF No. 84). Defendants therefore assert that because the closure was not “due to some sort of malicious intent on behalf of the defendants” Plaintiff’s claim should fail. (MSJ 20:14–21:8, ECF No. 82).

Like his other deliberate indifference claims, a claim based on a prisoner’s lack of access to outside exercise for an extended period of time derives from the due process clause of the Fourteenth Amendment and originates under the Eighth Amendment’s prohibition against cruel and unusual punishment. *See Gibson*, 290 F.3d at 1187–88; *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993) (“Exercise has been determined to be one of the basic human necessities protected by the Eighth Amendment.”). Accordingly, in order to support his claim, Plaintiff

1 need only “objectively show that he was deprived of something sufficiently serious, and make a
2 subjective showing that the deprivation occurred with deliberate indifference to the inmate’s
3 health or safety.” *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (internal quotations
4 omitted).

5 Regarding the first element, the Ninth Circuit has “held consistently that ‘ordinarily the
6 lack of outside exercise for extended periods is a sufficiently serious deprivation for Eighth
7 Amendment purposes.” *Thomas*, 611 F.3d at 1151 (internal quotations omitted). Even taking
8 the low end of Defendants admitted range, the deprivation of all outdoor exercise for a period
9 of seven months is sufficiently serious to meet the first element of the Eighth Amendment
10 analysis. *Lopez v. Smith*, 203 F.3d 1122, 1132–33 (9th Cir. 2000) (denial of all outdoor exercise
11 for six weeks meets objective Eighth Amendment requirement); *Keenan v. Hall*, 83 F.3d 1083,
12 1089–90 (9th Cir. 1996) (defendants were not entitled to summary judgment on claim that
13 inmate was not provided with outdoor exercise for 6 months while in segregation); *Allen v.*
14 *Sakai*, 48 F.3d 1082, 1087–88 (9th Cir. 1994) (six-week restriction of outdoor exercise to 45
15 minutes per week for prisoner in indefinite segregation constituted a deprivation sufficient to
16 implicate the Eighth Amendment).

17 Regarding the second element, “purposeful or knowing conduct is not necessary to
18 satisfy the subjective intent requirement of deliberate indifference for claims challenging
19 conditions of confinement.” *Jones v. Garcia*, 430 F. Supp. 2d 1095, 1103 (S.D. Cal. 2006)
20 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). Therefore, Defendants’ showing that
21 they were not motivated by a malicious intent to punish Plaintiff in denying him access to an
22 exercise yard does not entitle them to summary judgment on this claim.⁴ Defendants knew
23

24
25 ⁴ To the extent Defendants are also seeking leniency on the grounds that they did not have the resources to
provide Plaintiff with outdoor exercise while the normal yard was unsuitable for use, “costs cannot be permitted
to stand in the way of eliminating conditions below Eighth Amendment standards.” *Wright v. Rushen*, 642 F.2d
1129, 1134 (9th Cir. 1981).

1 about the lack of outdoor exercise and failed to find a suitable solution for months.
2 Accordingly, summary judgment on Count VIII is denied.

3 **D. Count IX; Policies and Training**

4 In Count IX, Plaintiff alleges that Defendant Demeo, as the elected sheriff of Nye County,
5 failed to properly formulate policies and train employees to ensure that detainees received
6 necessary medical care, which resulted in the injuries Plaintiff suffered in the previous counts.
7 (SAC at 26, ECF No. 72).

8 In their motion, Defendants merely make the conclusory assertion that Defendant
9 Demeo is entitled to summary judgment because Plaintiff “puts forth no evidence to support his
10 claim,” and “[a]s part of NCDC employees’ official training, each employee must complete
11 course work to ensure that they are qualified to provide adequate healthcare.” (MSJ 22:20–
12 23:25, ECF No. 82). However, the Court has already found that there is at least a genuine issue
13 of material fact concerning whether a policy under the Nye County’s Inmate Medical Indigent
14 Program is unconstitutional. *See infra* 7:1–11:9. Furthermore, as an official in charge of the
15 implementation of the policy at issue, Defendant Demeo is the proper defendant for this claim.
16 *See Colwell*, 763 F.3d at 1071 (9th Cir. 2014) (“We have held that a corrections department
17 secretary and prison warden were proper defendants in a § 1983 case because ‘a plaintiff
18 seeking injunctive relief against the State is not required to allege a named official’s personal
19 involvement in the acts or omissions constituting the alleged constitutional violation. Rather, a
20 plaintiff need only identify the law or policy challenged as a constitutional violation and name
21 the official within the entity who can appropriately respond to injunctive relief.’”) (quoting
22 *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013)). Accordingly,
23 summary judgment on Count IX is denied.

24 **E. Other Matters**

25 In addition to their substantive arguments for summary judgment, Defendants also raise

1 several other grounds for summary judgment on some or all of Plaintiff's claims. Because the
2 Court has determined that some of Plaintiff's claims survive Defendants' substantive
3 arguments, the Court will now address Defendants' other alleged grounds for summary
4 judgment.

5 **1. Commissioner Defendants**

6 Defendants Hollis, Borasky, and Wichman (the "Commissioner Defendants") are county
7 commissioners being sued in both their official and individual capacities. (SAC at 7, ECF No.
8 72). Defendants contend that the Commissioner Defendants are entitled to summary judgment
9 in both their official and individual capacities as matter of procedural right. (MSJ 10:5-28, ECF
10 No. 82).

11 An official-capacity suit "generally represents only another way of pleading an action
12 against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165
13 (1984) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n.55
14 (1978)). Accordingly, "a plaintiff seeking to recover in an official capacity suit must look to
15 the government entity itself" and not the actual official when the government entity is a named
16 defendant. *Id.* at 166. Therefore, because Nye County is a named defendant, it would be
17 redundant to keep the Commissioner Defendants in this suit in their official capacities.

18 Regarding their individual capacities, the Commissioner Defendants can only be
19 personally liable if Plaintiff pleads and proves that either: (1) the Commissioner Defendants
20 had personal involvement in the constitutional deprivation, or (2) that there was a sufficient
21 causal connection between the Commissioner Defendants' wrongful conduct and the
22 constitutional violation. *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). As a basis for
23 suing the Commissioner Defendants in their individual capacities, Plaintiff argues that he
24 mailed letters to each of them complaining of his lack of proper medical treatment on two
25 separate occasions, but the Commissioner Defendants failed to take any action to help him

1 obtain medical treatment.⁵ (Resp. 56–58, ECF No. 97). Defendants do not refute this assertion.
2 (MSJ 10:5-28, ECF No. 82). Plaintiff also argues that pursuant to state law, the Commissioner
3 Defendants are responsible for insuring the proper treatment of prisoners, which they failed to
4 do by permitting unconstitutional policies. (*Id.* at 58–60) (citing Nev. Rev. Stat. § 211.020).
5 Plaintiff’s mailing of letters to the Commissioner Defendants giving them notice of Plaintiff’s
6 claims is insufficient to constitute personal involvement in the alleged constitutional
7 deprivations. Furthermore, the state law cited by Plaintiff only shows that the Commissioner
8 Defendants would be the proper parties to sue in their official capacities if Plaintiff were not
9 also suing Nye County. Accordingly, summary judgment is granted on all claims in favor of
10 the Commissioner Defendants in their official and individual capacities.

11 **2. Monell Claims against Nye County**

12 Defendants also argue that Plaintiff’s claim against Nye County must fail as a matter of
13 law. (MSJ 13:1-14:15, ECF No. 82). Defendants, however, base their entire argument on the
14 premise that Plaintiff “cannot show that Nye County had a policy or custom in place that
15 resulted in the injuries that [Plaintiff] is alleging.” (*Id.*). Because this Court has already found
16 that that there is at least a genuine issue of material fact concerning whether a policy under the
17 Nye County’s Inmate Medical Indigent Program is unconstitutional and the cause of Plaintiff’s
18 injuries, Defendants’ argument fails. *See infra* 7:1–11:9.

19 **3. Qualified Immunity**

20 Defendants next assert that they are all entitled to qualified immunity when sued in their
21 individual capacities. (MSJ 11:15-12:28, ECF No. 82). “The doctrine of qualified immunity
22 protects government officials ‘from liability for civil damages insofar as their conduct does not
23 violate clearly established statutory or constitutional rights of which a reasonable person would
24

25 ⁵ Plaintiff does, however, admit that Defendant Borasky called NCDC on at least one occasion to inquire about Plaintiff’s situation. (Resp. 57, ECF No. 97).

1 have known.”” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*,
2 457 U.S. 800, 818 (1982)). The Supreme Court has “mandated a two-step sequence for
3 resolving government officials’ qualified immunity claims.” *Id.* at 232. “First, a court must
4 decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or
5 shown (see Rules 50, 56) make out a violation of a constitutional right.” *Id.* “Second, if the
6 plaintiff has satisfied this first step, the court must decide whether the right at issue was ‘clearly
7 established’ at the time of defendant’s alleged misconduct.” *Id.* “Qualified immunity is
8 applicable unless the official’s conduct violated a clearly established constitutional right.” *Id.*
9 “For a constitutional violation to be clearly established, its contours must be sufficiently clear
10 that a reasonable official would understand that what he is doing violates that right.” *Hope v.*
11 *Pelzer*, 536 U.S. 730, 739 (2002). Qualified immunity is intended to provide “ample protection
12 to all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*,
13 475 U.S. 335, 341 (1986).

14 First, the Court has found that Plaintiff has shown sufficient facts to create a genuine
15 issue of material fact concerning whether his constitutional rights were violated. *See infra* 7:1–
16 12:24, 17:11–19:2. Second, Plaintiff’s right to receive necessary medical care and outdoor
17 exercise is clearly established in this circuit. *See, e.g., Clement v. Gomez*, 298 F.3d 898, 904
18 (9th Cir. 2002) (“A public official’s ‘deliberate indifference to a prisoner’s serious illness or
19 injury’ violates the Eighth Amendment ban against cruel punishment.”); *LeMaire*, 12 F.3d at
20 1457 (“Exercise has been determined to be one of the basic human necessities protected by the
21 Eighth Amendment.”). The parameters of these rights were sufficiently clear that all
22 Defendants would understand that denying Plaintiff necessary medical care—including care
23 specifically prescribed by a doctor—or any outdoor exercise for several months would violate
24 these rights, even if the violations resulted from following a policy or from construction at the
25 jail. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) (“Where a statute

1 authorizes official conduct which is patently violative of fundamental constitutional principles,
2 an officer who enforces that statute is not entitled to qualified immunity.”). Defendants’
3 unsupported contention that “all of their actions were reasonably thought to be consistent with
4 recent case law concerning the medical, dental, and mental health care of [Plaintiff]” does not
5 show that they are entitled to qualified immunity. (MSJ 12:25–27, ECF No 82).

6 **4. Exhaustion**

7 The Prison Litigation Reform Act (the “PLRA”) mandates that inmates exhaust all
8 available administrative remedies before filing “any suit challenging prison conditions,”
9 including, but not limited to, suits under § 1983. *Woodford v. Ngo*, 548 U.S. 81, 85 (2006).
10 Additionally, the issue of exhaustion should be decided, if feasible, before reaching the merits
11 of a prisoner’s claim. *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014). In PLRA cases, it is
12 the defendant’s burden to prove that (1) there was an available administrative remedy, and (2)
13 that the prisoner did not exhaust that available remedy. *Id.* at 1172. “Once the defendant has
14 carried that burden, the prisoner has the burden of production. That is, the burden shifts to the
15 prisoner to come forward with evidence showing that there is something in his particular case
16 that made the existing and generally available administrative remedies effectively unavailable
17 to him.” *Id.* However, the ultimate burden of proof remains with the defendant. *Id.*

18 Defendants assert that Plaintiff lacks standing to bring any of his claims because he
19 failed to exhaust his administrative remedies by not filing for reviews of his denials. (MSJ
20 14:16-15:7). However, Defendants fail to provide any evidence of the alleged available
21 administrative remedy beyond one sentence in an affidavit by Defendant Marshall stating that
22 “[p]ursuant to the grievance process at NCDC, Ross can file a review request at each denial up
23 to the Sheriff.” (Decl. in Supp. ¶ 41, ECF No. 84). This self-serving, conclusory sentence alone
24 is insufficient for Defendants to meet their burden of showing an available administrative
25 remedy on summary judgment.


1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment (ECF
3 No. 82) is **GRANTED in part and DENIED in part**. Summary Judgment is granted in favor
4 of all Defendants on Counts I and V–VII of the Second Amended Complaint. Summary
5 judgment is granted in favor of Defendants Hollis, Borasky, and Wichman on all claims in their
6 official and individual capacities. Summary Judgment is denied on all other claims.

7 **IT IS FURTHER ORDERED** that Plaintiff's Cross-Motion for Summary Judgment
8 (ECF No. 98) is **DENIED**.

9 The Clerk of the Court shall enter judgment accordingly.

10 **DATED** this 31st day of March, 2015.

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14 Gloria M. Navarro, Chief Judge
15 United States District Judge
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